IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Not Restricted

S CR 2014 0080

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

v

CLIFFORD JOHN GERATHY

JUDGE:	BELL J
WHERE HELD:	Melbourne
DATE OF HEARING:	14 and 16 May 2018
DATE OF JUDGMENT:	18 May 2018
CASE MAY BE CITED AS:	*CDPP v Gerathy (Ruling)*
MEDIUM NEUTRAL CITATION:	[2018] VSC 255

CRIMINAL LAW – false accounting – elements of offence – dishonesty – whether used in special sense – whether confined to falsification or misuse of accounting documents – defence of claim of right – whether available in respect of view of accused to gain – character of dishonesty element in respect of falsification or misuse of accounting documents – where defence of claim of right is raised, whether sufficient for prosecution to establish that accused had no belief in legal right to falsify or misuse documents – 'dishonesty', 'view to gain', 'falsifies' – *Crimes Act 1958* (Vic) s 83(1)(a) and (b).

APPEARANCES:	Counsel	Solicitors
For the prosecution	Mr K T Armstrong	Office of Commonwealth Director of Public Prosecutions
For the defence	Mr A M Thomas with Mr C Fairfield	Doogue George Defence Lawyers

HIS HONOUR:

1 Section 83 of the *Crimes Act 1958* (Vic) provides:

> **False accounting**
>
> (1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another—
>
> (a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or
>
> (b) in furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in a material particular—
>
> he is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).
>
> (2) For purposes of this section a person who makes or concurs in making in an account or other document an entry which is or may be misleading, false or deceptive in a material particular, or who omits or concurs in omitting a material particular from an account or other document, is to be treated as falsifying the account or document.

2 The accused is charged with the following offence against s 83(1)(a):

> PARTICULARS AND STATEMENT OF OFFENCE
>
> The Director of Public Prosecutions for the State of Victoria charges that CLIFFORD JOHN GERATHY at Craigieburn in Victoria and divers other places on or about 12 July 2006 dishonestly and with a view to gain for another, falsified a document made or required for an accounting purpose, in that he concurred in the making in a document of an entry which was false in a material particular, namely in a debit note numbered AKSA/S/0604/06 from Aksavest to Securency Pty Ltd which falsely described the costs payable as related to marketing and other expenses.
>
> **Statement of Offence** — False accounting contrary to section 83 of the *Crimes Act 1958* (Vic).

3 In respect of this charge, the prosecution has provided the following further and better particulars:

> FURTHER AND BETTER PARTICULARS OF CHARGE
>
> In response to the request made by the accused on 6 April 2018 for further and better particulars, the prosecution provides the following:
>
> 1. The accused acted dishonestly by acting without any belief that Aksavest was legally entitled to make a debit note describing costs payable as related to marketing and other expenses in the amount of $79,502.00 or any amount.

2. The accused acted with a view to gain for another, namely Mr Abdul Kayum Syed Ahmad (Kayum).

3. The accused concurred in the making in the debit note of an entry which was false in a material particular by:

   a. conveying his agreement by email and other inferred communications;

   b. conveying instructions to Kayum as to the making of the debit note;

   c. receiving the debit note from Kayum; and

   d. transmitting the debit note to Securency Pty Ltd for payment.

4. The debit note was made or required for an accounting purpose in that the debit note was required as the basis for the payment of money by Securency Pty Ltd.

4 The accused has been arraigned on indictment for the charge and has pleaded not guilty. Prior to empanelment of the jury, the parties have sought a ruling in relation to the dishonesty element in the opening words of s 83(1). This is that ruling.[1] The issue raised is whether the dishonesty element applies to the view of the accused to gain, which is also found in those opening words. There is no question that it applies to para (a) (and (b)). The question is whether it applies to the view of the accused to gain as well. Also raised for consideration is the character of the dishonesty element as it applies to para (a), particularly in relation to the application of the defence of claim of right.

5 There have been many agreed facts in this trial which enable the court to appreciate that the answers to these questions are very important in this case. The main defence of the accused is that he acted in the belief that the person who was intended to benefit from the payment was legally entitled to the money concerned and therefore he did not act with a view to another's dishonest gain.

6 Does the dishonesty element in s 83(1)(a) of *Crimes Act* apply to the view to gain?

7 The defence submits that the dishonesty element in the opening words of s 83(1) applies both to the view of the accused to gain and to para (a). It was submitted that,

[1] After this ruling was delivered the accused changed his plea, was re-arraigned and pleaded guilty.

as 'dishonestly' in s 83(1) is used in a special statutory sense, it requires the prosecution to prove beyond reasonable doubt that the accused did not believe that he (or the third party) was lawfully entitled to the intended gain. It was submitted that if an accused knowingly falsifies a document with a view to gain for another, when subjectively believing that the other person is entitled to the gain, then the accused cannot be found to have acted dishonestly. This submission must be rejected.

8 As was held by Ormiston JA in *R v Jenkins*, the crime stipulated in s 83 of the *Crimes Act* is

> directed to the falsification of accounting and related records and the provision of false material contained in accounting and related records and documents.[2]

This conclusion is supported by the heading to the section —'False accounting' — which now forms part of the *Crimes Act*.[3]

9 The expression 'gain' and 'loss' are relevantly defined in s 71(1) of the *Crimes Act* as follows:

> ***gain*** and ***loss*** are to be construed as extending only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent; and—
>
> (a) ***gain*** includes a gain by keeping what one has, as well as a gain by getting what one has not; and
>
> (b) ***loss*** includes a loss by not getting what one might get, as well as a loss by parting with what one has.

It is not determinative, but this definition does not include, imply or reflect any dishonesty element.

10 The defence relied upon the history of div 2 of pt 1 of the *Crimes Act*,[4] which is derived from the *Theft Act 1968* (UK). This history is fully described by Ormiston JA in *Jenkins*.[5] It does not support interpreting the dishonesty element in s 83(1) as

2 (2002) 6 VR 81, 93 [29] ('*Jenkins*').
3 *Interpretation of Legislation Act 1984* (Vic) s 36(1).
4 Division 2 of pt 1 was inserted into the *Crimes Act* by the *Crimes (Theft) Act 1973* (Vic).
5 (2002) 6 VR 81, 93–8 [29]–[39].

applying to the view of the accused to gain. The decisions of courts in England under the *Theft Act* on which the accused relied likewise do not support that interpretation.

11 The case of *Attorney-General's Reference (G and S) (No 1 of 2001)*[6] was decided under s 17(1)(b) of the *Theft Act*, which is in the same material terms as s 83(1)(b) of the *Crimes Act*. The issue was whether two accused had offended by making false claims against a trust fund in which they themselves were the beneficiaries. The trial judge acquitted them upon the basis that this was not done with a view to gain. The Court of Appeal (Kennedy LJ, Curtis and Pitchford JJ) held that this was incorrect. The critical passage in the judgment of Kennedy LJ, who spoke for the court, examines the issue of gain separately from the issue of dishonesty.[7] The concept of dishonesty is not analysed against the requirement of the intention of the accused to gain.

12 *Atkinson v The Queen*[8] was decided under s 17(1)(a) of the *Theft Act*, which is in the same material terms as s 83(1)(a) of our Act. The accused was a pharmacist who had included false prescription forms in a bundle that was given when making claims to the government pharmaceutical support scheme. She was found guilty of the offence and appealed on grounds not here material. The Court of Appeal (May LJ, Evans J and Judge Roberts QC) dismissed the appeal. Speaking for the court, May LJ discussed the different mental states of intending to gain and dishonesty:

> The specific intent required for murder is quite distinct from the act or acts which cause death. The same may be said of physical acts which comprise false accounting and the mental state in which those acts are done. The mental state has to be dishonest with a view to gain or with intent to cause loss. But that is a composite mental state which only lawyers would think of breaking into component parts. Dishonesty in this context connotes deliberately and intentionally making a false accounting statement knowing it to be false. The purpose or intention of making the false statement has to be established. And we suppose that unusual facts might possibly arise where a person deliberately and intentionally makes a false accounting statement knowing it to be false without any purpose of personal gain or loss to another. But that would be quite unusual. In the present case, there was no issue but that, if the appellant did make deliberate false accounting

6 [2003] 1 Cr App R 8 ('*Attorney-General's Reference (No 1 of 2001)*').
7 Ibid 141–2 [27]–[29].
8 [2003] EWCA Crim 3031 (7 November 2003) ('*Atkinson*').

> statements knowing them to be false, she did so with the necessary intent. As the judge rightly said, the crucial question was whether she was dishonest or not.[9]

13 As can be seen, the court interpreted the dishonesty element in s 17(1) by reference to para (a). It said (to repeat): 'Dishonesty in this context connotes deliberately and intentionally making a false accounting statement knowing it to be false'.[10] It interpreted the view to gain element separately. It said (to repeat): 'The purpose or intention of making the false statement has to be established'.[11]

14 Finally there is *R v Paul White (AKA Lord Hanningfield)*.[12] The accused was convicted of false accounting (presumably under s 17(1)(a) of the *Theft Act*). He was a life peer of the House of Lords who falsified travel and living expenses claims. In his evidence, he candidly admitted falsifying the claims but said he believed that he had a right to do this because he had suffered loss in accepting the peerage. The Court of Appeal (Hughes LJ (Vice President), Treacy and Blake JJ) dismissed his appeal.

15 The accused in the present case relied upon a passage in the judgment in which, speaking for the court, the Vice President analysed the concept of a claim of right:

> The concept of a claim of right applies to the elements of the offence of theft. It means that a defendant who appropriates property in the belief that he has in law the right to deprive the other of it has a defence to a charge of theft. Those are the terms of section 2(1)(a) of the *Theft Act 1968*. A claim of right means a claim to entitlement in law — not, we agree, to commit an offence because if it exists there is no offence — but it does mean a claim to entitlement in law to do what the defendant did. Such a concept fits the element of appropriation which is central to the offence of theft. It is a good deal less easy to fit it into offences of obtaining by deception or for that matter of false accounting because if one tries to do so one is enquiring whether the defendant asserted a legal right to deceive other people. However, we think we should assume for the sake of argument that whether that is the best analysis or not, a belief analogous to a claim of right can indeed provide a defence to a charge of obtaining by deception or for that matter false accounting. We think that that ought to be the law and we are satisfied that in one way or another it is.[13]

As can be seen, the Vice President held, and I respectfully agree, that the concept of claim of right can apply, with modification, to a false accounting charge, even

9 Ibid [16].
10 Ibid.
11 Ibid.
12 [2011] EWCA Crim 1927 (20 July 2011) ('*White*').
13 Ibid [19].

though the fit is imperfect. But the Vice-President applied this concept to the falsification element (read with the dishonesty element), not to the requirement for intention to gain. Applying this reasoning, the Vice-President held that 'the judge was quite right to explain the defendant's asserted defence [claim of right] in terms of dishonesty'.[14] The subsequent analysis in the judgment is also concerned with dishonesty.

16 Before discussing decisions of this court in relation to offences specified in div 2 of pt 1 of the *Crimes Act*, I draw attention to a certain pattern in the statutory formulation of those offences. The comments are my responses to the form of the provisions but are consistent with how they have been interpreted (see below).

17 Section 81(1) provides:

> (1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an indictable offence and liable to … imprisonment …

It can be seen that the dishonesty element here relates to the obtaining but not to the deception. The dishonesty relates to obtaining property belonging to another with the intention of personally depriving the other of it. Deception must also be established, but not dishonest deception.

18 Section 82(1) provides:

> (1) A person who by any deception dishonestly obtains for himself or another any financial advantage is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

Again, it can be seen that the dishonesty element here relates to the obtaining and not to the deception. The dishonesty relates to obtaining financial advantage. Deception must also be established, but not dishonest deception.

19 I have already set out s 83(1). In my view, the dishonesty element relates to false accounting etc (para (a)) and to misuse of accounting documents (para (b)), not to the view of the accused to gain. In para (a), the dishonesty relates to deliberately

[14] Ibid [20].

and intentionally destroying, defacing, or concealing any account etc or making a false accounting statement knowing it to be false. In para (b), the dishonesty relates to deliberately and intentionally furnishing information for the specified purpose etc knowing it is or may be misleading etc. This kind of dishonesty must be established, but not dishonest view to gain.

20 I also mention s 86(1), which has a similar structure to s 83(1). Section 86(1) provides:

> (1) A person who dishonestly, with a view to gain for himself or another or with intent to cause loss to another, destroys, defaces or conceals any valuable security, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court of justice or any government department is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

As in s 83(1), I think the dishonesty element relates to the destruction etc, not to the view of the accused to gain. The dishonesty relates to destroying, defacing or concealing any valuable security etc. That kind of dishonesty must be established, not dishonest view to gain.

21 Similarly there is s 87(1), which provides:

> (1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief—
>
> (a) that he has reasonable grounds for making the demand; and
>
> (b) that the use of the menaces is proper means of reinforcing the demand.

Dishonesty is not here an element but the view to gain requirement is expressed separately to the element of making an unwarranted demand with menaces, which is the gravamen of the offence. This formulation may be compared with ss 83(1) and 86(1).

22 As can be seen, the pattern evident in these provisions is that the dishonesty element is not expressed to apply to all of the other elements of the offences in question. The

dishonesty element is only expressed to apply to the substantive criminalised act and it derives its particular character from that context.

23 Turning now to the decided cases, it was decided in *R v Salvo*[15] that the dishonesty element in s 81(1) of the *Crimes Act* has a special meaning, which is whether the accused believed that he or she had 'a legal right to or in respect of "the property"'.[16] It will be necessary to refer to this judgment when discussing the particular character of the dishonesty element in s 83(1). I am discussing here whether that element applies to the view of the accused to gain.

24 *Salvo* decided unanimously that the dishonesty element in s 81(1) of the *Crimes Act* applies to the obtaining of the property and not to the requirement for deception. Thus, McInerney J held:

> Assuming deception (sc. of a person) the requirement of dishonesty means that the conduct of obtaining by a deception property belonging to another with the intention of permanently depriving the other of it will not contravene s 81 unless it was done 'dishonestly'.[17]

This distinction infuses the whole analysis in his Honour's detailed judgment, which was in dissent but not on this point. Murphy J held:

> I agree with Fullagar J that s 81(1) contemplates that not all obtainings by deception are as such dishonest. In other words, the word 'dishonestly' in s 81(1) is not merely descriptive of the phrase 'by any deception ... obtains'. The word 'dishonestly' imports an additional element into the offence. It must be proven that an accused was not acting honestly but was acting dishonestly when he 'by any deception ... obtains property belonging to another'.
>
> The very deception practised may, in all the circumstances, demonstrate the accused's dishonesty, that is, show that he makes no claim of right. But, where, as here, an explanation is advanced to explain the reason for practising the deception (which is itself frankly admitted), the only real issue in the case would seem to be the accused's state of mind when obtaining the car from Kapaufs by means of the deception.[18]

Fullagar J held:

15 [1980] VR 401 ('*Salvo*').
16 Ibid 433 (Fullagar J, Murphy J agreeing and McInerney J dissenting).
17 Ibid 406.
18 Ibid 422.

> the section contemplates that an obtaining by deception, with intent permanently to deprive, may be done or achieved otherwise than dishonestly.[19]

25 *Salvo* was approved by the Full Court in *R v Brow*[20] and *R v Bonollo*,[21] which both concerned s 81(1) of the *Crimes Act*, and by the Court of Appeal in *R v Todo*,[22] which concerned both s 81(1) and s 82(1) of that Act. As Charles JA (Winneke P and Ormiston JA agreeing) pointed out in *Todo*,[23] in neither *Peters v The Queen*[24] nor *Macleod v The Queen*[25] did the High Court disapprove of the *Salvo* line of cases as these applied to the relevant Victorian statutory offences. More recently, the *Salvo* line of cases was discussed with approval by the Court of Appeal in *SAJ v R*,[26] although the ordinary test of dishonesty was adopted because it was used in that sense and not in any special sense in the statutory offence in question.

26 The distinction that is drawn in *Salvo* between dishonesty (which relates to the obtaining) and deception (to which dishonesty does not relate) has been referred to with approval in other cases concerning similar statutory offences. Section 178BA(1) of the *Crimes Act 1900* (NSW) provides that a person who 'by any deception dishonestly obtains for himself or any person any money …' commits a crime. In *R v Love*,[27] Gleeson CJ, Newman and Loveday JJ followed the *Salvo* line of cases to hold that it was sufficient for the prosecution to prove that the accused had no belief in a legal right to the property. Referring to the judgments of Murphy and Fullagar JJ in *Salvo*, Gleeson CJ, Newman and Loveday JJ said in *Love*:

27

> Their Honours [in *Salvo*] pointed out that, as a matter of construction of the statutory provision (which was similar to s 178BA), it is contemplated that there may be a deceptive obtaining of property which is not dishonest. Of course in many cases the deception will be powerful evidence of dishonesty. However, when a claim of legal right of the kind now in question is raised,

19 Ibid 425.
20 [1981] VR 783 (Young CJ, Crockett and Tadgell JJ) ('*Brow*').
21 [1981] VR 633 (Young CJ, McInerney and McGarvie JJ agreeing) (McInerney felt constrained to do so: see 644–5) ('*Bonollo*').
22 (2004) 10 VR 244 ('*Todo*').
23 Ibid 253 [25].
24 (1998) 192 CLR 493 ('*Peters*').
25 (2003) 214 CLR 230.
26 (2012) 36 VR 435 (Nettle and Weinberg JJA, Davies AJA) ('*SAJ*').
27 (1989) 17 NSWLR 608 ('*Love*').

> the issue is whether there was a belief in a legal right to obtain the property, not whether there was a belief in a legal right to practise the deception. Fullagar J said (at 440):
>
> > … 'a claim of right' … does not require a belief in the accused in a right to obtain the property by *deception, or by the particular deception employed*. It is the obtaining that the Crown must prove was done dishonestly, not the practising of the deception.[28]

Applying *Love*, Abadee J in *Pollard v Commonwealth Director of Public Prosecutions* explains that:

> in respect of obtaining money by deception in s 178BA, dishonesty is a separate ingredient of the offence, being additional, to the requirement of deliberate or reckless deception, and further that in relation to each of such deceptions, it is contemplated that there may be a deceptive obtaining of property which is not dishonest: see *R v Potger* (1970) 55 Cr App R 42, 46.[29]

28 Although the *Salvo* line of cases concern ss 81 and 82 of the *Crimes Act* and not s 83, all of these provisions were inserted into the *Crimes Act* by the *Crimes (Theft) Act 1973* (Vic) and have a common origin in the *Theft Act 1968* (UK), as do ss 86 and 87. I think the analysis in the *Salvo* line of cases is relevant to the interpretation of s 83(1) and both parties relied upon these cases in the present case.

29 As a matter of grammar, the phrase-element 'with a view to gain' etc is expressed in the opening words of s 83(1) as a single unit of language. It is separated from the 'dishonestly' element and the element in para (a) by punctuation (the comma and the dash). It appears to sit on its own as a separate element. The more natural reading is that the word 'dishonestly' does not relate to the words after the comma and before the dash but to para (a) (and para (b)) which come after the dash. It is not impossible to read the word 'dishonestly' as applying to the view of the accused to gain, but there would need to be justification for doing so in the purpose of the provision or the context of div 2 of pt 1.

30 The purpose of s 83(1) is to stipulate the offence of false accounting and misuse of accounting documents. As Ormiston JA held in *Jenkins* (see above), it is directed to that end, a conclusion his Honour made after considering the language, policy and history of the legislation. It is consistent with this purpose to interpret the

[28] Ibid 615–16 (emphasis in original).
[29] (1992) 28 NSWLR 659, 668.

dishonesty element as applying only to the falsification (para (a)) and misuse (para (b)) of accounting documents. The gravamen of the crime is the falsification or misuse of such documents, not the intention to gain. It would blunt the point of the crime to apply dishonesty to that intention because it would require the prosecution to establish dishonesty in relation to it as well as to falsification or misuse of the documents. Where the prosecution establishes that the accused has dishonestly falsified or misused an accounting document with intention to gain, the accused might escape conviction because the prosecution has not been established that the intention was not dishonest even though it has established that the falsification was.

31 Unquestionably, a view to gain must be established by the prosecution. It is an element of the offence, although it is not an element of the same kind as dishonestly falsifying or misusing accounting documents. If intention to gain were not an element, the offence would cover all dishonest falsifications or misuse of such documents. This is not the legislative intention. It has chosen to limit the offence to those where the accused has so acted with intention to gain. Dishonest falsification and misuse where there is no such intention has not been criminalised. The policy behind this limitation, so understood, is fully implemented by giving full force and effect to the words 'with a view to gain' etc without importing any dishonesty requirement. Including a dishonesty requirement seems strained. The view to gain element expresses a state of mind (to gain) with clarity and does not need to be read with a different state of mind (dishonesty) to be comprehended and applied.

32 The context of div 2 of pt 1 does not support interpreting s 83(1) so as to require the prosecution to establish that the accused acted dishonestly with a view to gain. As the above discussion reveals, that is not the function of the dishonesty element in other provisions of the division. With the offence of obtaining property by deception in s 81(1), the dishonesty element has been held authoritatively to relate to the obtaining and not to the deception (see above). The same is the case with the offence of dishonestly obtaining financial advantage by deception in s 82(1). Under these provisions, the prosecution does not have to prove dishonest deception. Just

as ss 81(1) and 82(1) specify deception as a discrete element, s 83(1) specifies view to gain as a discrete element. The provision does not require the prosecution to prove that the view to gain was dishonest.

33 Because of the structural similarities between ss 83(1) and 87(1), I note that decisions under the English equivalent to s 87(1) establish that the criminal mental element in the offence of blackmail relates to making an unwarranted demand with menaces, not to doing so with intention to gain. Consequently a belief in the right to make a claim — say to recover a debt due and owing — will be no defence where the demand is made with menaces unless the accused has a belief in the right to use menaces to enforce the claim.[30] This is consistent with the meaning of dishonesty in s 83(1)(a) as I have interpreted it.

34 The decided cases discuss the significant common ground between dishonesty and deception and between dishonesty and intent to gain as states of mind. As Murphy J said in *Salvo*, '[t]he very deception practised may, in all the circumstances, demonstrate the accused's dishonesty'.[31] Similarly Gleeson CJ, Newman and Loveday JJ said in *Love* that 'in many cases … deception will be powerful evidence of dishonesty'.[32] May LJ, Evans J and Judge Roberts QC memorably said in *Atkinson* that the mental state 'to be dishonest with a view to gain' was a 'composite mental state which only lawyers would think of breaking into component parts'.[33] Despite this common ground, the distinction between dishonesty and deception and between dishonesty and view to gain has been deliberately drawn in the formulation of the elements of the statutory offences in this category and the courts have respected and given effect to these different states of mind.

35 In conclusion, as a matter of language, grammar and punctuation, the dishonesty element in s 83(1) applies to para (a) (and para (b)) and not to the view of the accused to gain. This is consistent with the purpose of the provision, which is to

30 *Attorney-General's Reference (No 1 of 2001)* [2003] 1 Cr App R 8, 141 [27] (Kennedy LJ, Curtis and Pitchford JJ), *R v Parkes* [1973] Crim LR 358 (Judge Dean QC); *R v Lawrence and Pomroy* (1971) 57 Cr App R 64, 72 (Cairns LJ, Orr and Bean JJ).

31 [1980] VR 401, 422.

32 (1989) 17 NSWLR 608, 615.

33 [2003] EWCA Crim 3031 (7 November 2003) [16].

criminalise dishonest false accounting (and misuse of accounting documents) where there is intention to gain, not intending to obtain dishonest gain by those dishonest means. It is also consistent with the way that cognate provisions in div 2 of pt 1 of the *Crimes Act* have been expressed and interpreted, and with the interpretation of the antecedent English provisions by courts in that jurisdiction.

36 It is now necessary to identify the special sense in which dishonesty is used in s 83(1)(a).

37 Character of dishonesty element in s 83(1)(a)

38 As was pointed out by Weinberg JA and Davies AJA (Nettle JA agreeing) in *SAJ*,[34] Toohey and Gaudron JJ discussed in *Peters* the approach to be adopted when the character of the dishonesty element in a crime is in question:[35]

> In a case in which it is necessary for a jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest. Necessarily, the test to be applied in deciding whether the act done is properly characterised as dishonest will differ depending on whether the question is whether it was dishonest according to ordinary notions or dishonest in some special sense. If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people. However, if 'dishonest' is used in some special sense in legislation creating an offence, it will ordinarily be necessary for the jury to be told what is or, perhaps, more usually, what is not meant by that word. Certainly, it will be necessary for the jury to be instructed as to that special meaning if there is an issue whether the act in question is properly characterised as dishonest.[36]

39 The task at hand, therefore, is to identify whether and in what special sense the concept of dishonesty is used in s 83(1)(a).

40 As can be seen from the footnote, Toohey and Gaudron JJ illustrated the case of a statute employing a 'special meaning' of dishonesty by reference to *Salvo*. According to the *Salvo* line of cases, the special sense in which dishonesty is used in the offences

34 (2012) 36 VR 435, 442–3 [52].
35 (1998) 192 CLR 493, 504 [18] (footnote included).
36 As in *Salvo*.

in ss 81(1) and 82(1) relates to whether the accused had a belief in a legal right to the property or financial advantage (see above). That conclusion followed from the nature of the offences in question.

41 In *Salvo*, *Brow* and *Bonollo*, the offence in question was obtaining property by deception under s 81(1). This offence is concerned with obtaining property belonging to another by deception. The dishonesty relates to obtaining that property with the intention of permanently depriving the other of it. The prosecution must establish that the accused did not believe that he or she had a legal right to the property.[37]

42 In *Todo*, the offence in question included obtaining financial advantage by deception under s 82(1). This offence is concerned with obtaining financial advantage by deception. The dishonesty relates to obtaining that advantage. The prosecution must establish that the accused did not believe that he or she had a legal right to the advantage.[38]

43 The approach adopted in these cases was to identify the character of the dishonesty element by reference to the nature of the offence concerned, as revealed by its other elements. Because ss 81(1) and 82(1) criminalise dishonestly obtaining property or financial advantage (where there is deception), the special sense in which dishonesty is used was held to relate to whether the accused had a belief in a legal right to the property or advantage. This does not mean that dishonesty is used in precisely that special sense in relation to other offences in div 2 of pt 1 so that it is the belief of the accused in a legal right to property or advantage that is always in question.

44 The nature of the offence in s 83(1), as revealed by its other elements, is different to those specified in ss 81(1) and 82(1). Section 83(1) criminalises dishonest falsification or misuse of accounting documents, where there is intention to gain. The gravamen of the offence is falsifying or misusing accounting documents, not intending to

37 *Salvo* [1980] VR 401, 433 (Fullagar J, Murphy J agreeing and McInerney J dissenting); *Brow* [1981] VR 783; 788-91 (Young CJ, Crockett and Tadgell JJ); *Bonollo* [1981] VR 633, 634 (Young CJ), 644 (McInerney J), 651 (McGarvie) J).

38 *Todo* (2004) 10 VR 244, 252–3 [22]–[26] (Charles JA, Winneke P and Ormiston JA agreeing).

obtain gain. Therefore the special sense in which dishonesty is used in s 83(1) is one that relates to the falsification or misuse of accounting documents. Applying the *Salvo* line of cases in this particular context, when the defence of claim of right is in issue, the question is whether the prosecution has established that the accused did not believe that he or she had a legal right to falsify or misuse the documents.

45 While, in such cases, it is necessary for the prosecution to establish that the accused did not believe that he or she had a legal right to falsify or misuse the document, I do not think that this communicates the full character of the dishonesty involved. In the words of Toohey and Gaudron JJ in *Peters*, it does not adequately explain what 'knowledge, belief or intent' renders the act dishonest so as 'to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest'.[39] I think the special sense in which dishonesty is used in s 83(1)(a) is more fully explained in *Atkinson*. The Court of Appeal stated that the dishonesty involved where the offence charged is falsifying an accounting document is 'deliberately and intentionally [making] a false accounting statement knowing it to be false'.[40] Where claim of right is raised as a defence, it is that which the prosecution must establish the accused did not believe he or she had a legal right to do.

46 This characterisation of the way dishonesty is used in s 83(1)(a) is consistent with the decision of the Court of Appeal in *White*. As set out above, it was decided in that case that claim of right, or 'belief analogous to claim of right', was a defence to the charge of false accounting. The court went on to make the important point that 'what matters' was 'the way in which' this defence was applied.[41]

47 The defence in the present case submitted that the court in *White* applied the defence to the issue of intention to gain. It did not. The court upheld the charge of the judge to the jury, which dealt with the claim of right defence by reference to the issue of dishonesty, expressly rejecting the submission on appeal that this was incorrect.[42]

39 (1998) 192 CLR 492, 504 [18].
40 [2003] EWCA Crim 3031 (7 November 2003) [16] (May LJ, Evans J and Judge Roberts QC).
41 [2011] EWCA Crim 1927 (20 July 2011) [19] (Hughes LJ (VP), Treacy and Blake JJ).
42 Ibid [17]–[18].

48 Further, after deciding that 'what matters' was how the defence was applied, the court observed that it was 'far from clear that [the] defendant did claim that he had a legal entitlement to do what he did' (ie falsify the expense claims).[43] It went on to state that, even if this was the defendant's claim, this related 'to whether the defendant was honest or not'.[44] Therefore 'the judge was quite right to explain the defendant's asserted defence in terms of dishonesty'.[45]

49 The accused submitted that so characterising the dishonesty element in s 83(1)(a) effectively deprived it of any work to do. It was submitted that the concept of falsification necessarily embraces dishonesty in deliberately and intentionally making a false accounting document knowing it to be false. Confining the claim of right defence to that kind of dishonesty, and disconnecting it from intention to gain, would make the offence in s 83(1) one of, or near, strict liability, which was not intended. These submissions must be rejected.

50 As I comprehend what the legislature has enacted in s 83(1)(a), the falsification offence is established by proof beyond reasonable doubt that, with a view to gain, the accused has dishonestly falsified an accounting document. The dishonesty involved is deliberately and intentionally making a false accounting document knowing it to be false. That is a criminal state of mind which means the offence cannot be described as a strict liability offence. When the defence of claim of right is in issue, that kind of dishonesty will not be established where the prosecution fails to prove that the accused did not believe that he or she had a legal right to so falsify the document. The defence goes to falsification (or misuse) of the document, not to intent to gain. This does not detract from the obligation of the prosecution to prove dishonesty as a criminal state of mind.

51 There are authorities holding that the concept of claim of right provides a defence where the belief is in a right to the property and not to the means used to obtain it. *R*

43 Ibid [20].
44 Ibid.
45 Ibid.

v Langham[46] and *R v Bedford*[47] fall into this category. These were robbery cases where, in the words of Duggan J (Vanstone J agreeing) in *Bedford*, applying the judgment of King CJ (Mohr and Johnson JJ agreeing) in *Langham*, the belief in the claim of right need only relate to the 'entitlement to the property' and 'need not extend to a belief to take the actual measures which were used'.[48] But theft is a foundational element of the offence of robbery. A claim of right to property simpliciter is a defence to a charge of robbery because it is a defence to a charge of theft, not because the defence of claim of right always operates in this generalised way. In s 83(1)(a) it does not.

52 An alternative defence submission in the present case was that the defence of claim of right was available in respect of intention to gain as a sub-element of this defence as it applies to dishonest falsification, upon the basis that there were cases where the former was necessarily wrapped up in the latter. At the evidentiary level, I can appreciate this submission, especially because of the overlap between the concepts of intention to gain and dishonesty. Therefore evidence that an accused believed that he or she or another had a legal right to the gain in question might be relevant and admissible evidence in relation to whether the accused believed that he or she had a legal right to falsify or misuse the document. But it is necessary to emphasise the limited purpose for which this evidence might be relevant and admissible. Such evidence might be relevant and admissible in respect of whether the defence of claim of right has been made out in respect of falsifying or misusing the document. Such evidence would not be relevant and admissible in respect of whether the defence of claim of right has been made out in respect of intention to gain, because that defence is not available.

53 Conclusion

54 For those reasons, I would conclude that, under s 83(1)(a) (and (b)) of the *Crimes Act*, an accused with intention to gain who dishonestly falsifies (or misuses) an accounting document will be guilty of an offence. In relation to para (a), the

46 (1984) 36 SASR 48 (Full Court of Supreme Court of South Australia) ('*Langham*').
47 (2007) 98 SASR 514 (Supreme Court of South Australia (Court of Criminal Appeal)) ('*Bedford*').
48 Ibid 518 [11], citing *Langham* (1984) 36 SASR 48, 51.

dishonesty involved is deliberately and intentionally falsifying such a document, knowing it to be false. Where claim of right is in issue, it is sufficient for the prosecution to establish that the accused did not believe that he or she had a legal right to falsify (or misuse) the document. In such cases, it is not necessary for the prosecution to establish that the accused did not believe that he or she or another had a legal right to the gain.